Supreme Court, U.S.
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No. 79-1023

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1979

POLYVEND, INC.,

Plaintiff-Appellant,

vs.

THEODORE D. PUCKORIUS, individually and as Director of Administrative Services, and THE ILLINOIS DEPARTMENT OF ADMINISTRATIVE SERVICES,

Defendants-Appellees.

MOTION TO DISMISS OR IN THE ALTERNATIVE TO AFFIRM

WILLIAM J. SCOTT
Attorney General of the State of Illinois
160 North LaSalle Street, Room 900
Chicago, Illinois 60601 (793-3500)

Attorney for Defendants-Appellees.

MICHAEL J. HAYES,
JEROME J. WEBB,
ROBERT ORMAN,
Assistant Attorneys General
160 North LaSalle Street, Room 850
Chicago, Illinois 60601 (793-3587)

Of Counsel.

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Defendants-Appellees.

MOTION TO DISMISS OR IN THE ALTERNATIVE TO AFFIRM

Appellees Theodore D. Puckorius[1] and the Illinois Department of Administrative Services, by their attorney WILLIAM J. SCOTT, Attorney General of the State of Illinois, move this Court to dismiss the appeal sought from the decision of the Illinois Supreme Court entered October 2, 1979 or, in the alternative, that the decision of the Illinois Supreme Court be affirmed.

OPINION BELOW

The opinion of the Illinois Supreme Court from which appellant appeals is reported at 77 Ill.2d 287, 395 N.E.2d 1376 (1979).

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[1] Theodore Puckorius, the former Director of the Illinois Department of Administrative Services, was Director at the time Plaintiff commenced this action. His successor is Mr. Vincent Toolen.

JURISDICTION

This appeal, brought under 42 U.S.C. 1257(2) to review the opinion of the Illinois Supreme Court, must be dismissed or alternatively the opinion of the Illinois Supreme Court must be affirmed on the ground that the appeal fails to present any substantial federal question which warrants further argument.

QUESTIONS PRESENTED

WHETHER THE APPEAL FROM THE DECISION OF THE ILLINOIS SUPREME COURT PRESENTS A SUBSTANTIAL FEDERAL QUESTION WARRANTING FURTHER REVIEW AND ARGUMENT.

1. Whether this Court has jurisdiction to review the decision of the Illinois Supreme Court that a unilateral expectation to future Illinois contracts is not a protectable property interest under Illinois law.

2. Whether the language of Section 10-1 of the Illinois Purchasing Act is sufficiently definite that men of common intelligence exercising ordinary common sense may understand and comply with its provisions.

3. Whether Section 10-1 of the Illinois Purchasing Act, by regulating with whom the State may contract, constitutes a bill of attainder contrary to Article 1, Section 10 of the United States Constitution.

STATUTE INVOLVED

Illinois Revised Statutes, 1977, ch. 127, § 132.10

No person or business entity shall be awarded a contract or sub-contract if that person or business entity: (a) has been convicted of bribery or attempting to bribe an officer or employee of the State of Illinois in that officer or employee's official capacity; or (b) has made an admission of guilt of such conduct which is a matter of record but has not been prosecuted for such conduct.

For purposes of this Section, where an official, agent, or employee of a business entity committed the bribery or attempted bribery on behalf of such an entity and pursuant to the direction or authorization of a responsible official thereof, the business entity shall be chargeable with the conduct.

STATEMENT OF THE CASE

Plaintiff, an Arkansas corporation, responded to the Illinois Department of Administrative Services' (Department) advertisement for bids to manufacture the 1979 motor vehicle license plates for the State of Illinois. Bids for the contract were opened by the Department on October 12, 1977. Plaintiff submitted the only bid which was in the amount of $10,390,440.00. Section 10-1 of the Illinois Purchasing Act (Section 10-1) became effective on October 1, 1977 and prohibits State purchasing agents from awarding a State contract to any person or business entity within its scope. Plaintiff, believing that its bid would be rejected because of the prior activity and conviction of its former president and then controlling stockholder J. Patrick Stoltz, instituted this action in the Circuit Court of Cook County, Illinois. Plaintiff sought a declaration that Section 10-1 was unconstitutional and injunctive relief requiring the award of the contract to it. On November 8, 1977 the defendants rejected the bid submitted by the plaintiff.

On cross motions for summary judgment the trial court upheld the constitutionality of Section 10-1. Plaintiff appealed to the Illinois Appellate Court which reversed the trial court's decision. The Illinois Supreme Court granted defendants leave to appeal, reversed the Appellate Court Decision, and affirmed the decision of the trial court by upholding the constitutionality of Section 10-1.

The record reflects that in 1974 Mr. Stoltz, president of Metal Stamping Corporation, was convicted of bribery in the United States District Court for the Northern District of Illinois. The conviction stemmed from Mr. Stoltz's conduct as president of Metal Stamping Corporation and involved his bribing a former Illinois Secretary of State. In 1973 Mr. Stoltz resigned as president of Metal Stamping Corporation. In 1974, Polyvend Inc., a wholly owned subsidiary of Metal Stamping Corporation, was merged into Metal Stamping Company. In 1976 the corporate charter of Metal Stamping Corporation was amended to change the corporate name to that of Polyvend Inc., its former subsidiary. Mr. Stoltz continued to be, and was at all relevant times, the controlling stockholder of Polyvend Inc.

ARGUMENT

THE UNITED STATES SUPREME COURT SHOULD DISMISS THIS APPEAL, OR IN THE ALTERNATIVE, SHOULD AFFIRM THE DECISION OF THE ILLINOIS SUPREME COURT, BECAUSE NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED.

I.

SECTION 10-1 OF THE ILLINOIS PURCHASING ACT HAS NOT DENIED APPELLANT DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

In requesting this Court to hear its appeal from the decision of the Illinois Supreme Court, the Appellant contends that substantial federal questions are presented. In particular, the Appellant claims that the rejection of its bid pursuant to Section 10-1, (Ill.Rev.Stat. (1977) ch. 127 § 132.10-1), presents a substantial federal question. Appellant characterizes the question in terms of Section 10-1's denial of procedural due process guarantees provided in the Fourteenth Amendment to the United States Constitution. Curiously, however, Appellant opens its Jurisdictional Statement with admissions that belie its own contention that a substantial federal question is presented by this appeal. "A bidder has no right to a government contract: . . . (Jurisdictional Statement, at p. 9)" is a statement which totally contradicts the Appellant's claim that it has been denied procedural due process guarantees by the rejection of its bid under Section 10-1. Furthermore, Appellant's discussion of the scope and origin of interests which are protectable under the due process clause of the Fourteenth Amendment erodes its ultimate contention that the questions of law involved are substantial.

The decision of the Illinois Supreme Court was premised upon, and is supported by, a substantial body of law which has been espoused by this Court in the area of procedural due process claims. Ironically, Appellant now relies upon much of the same recognized authority to reach an opposite conclusion. Appellees submit that a review of the questions raised by Appellant in this appeal, under the numerous prior decisions of this Court which have shaped and defined the scope of procedural due process requirements, will mandate a dismissal of this appeal for want of a substantial federal question.

The due process clause of the Fourteenth Amendment provides no substantive right. Rather, it imposes restrictions and limitations upon government in an effort to protect the rights of individuals. The procedural aspects of the due process clause generally require that government must give notice and an opportunity to be heard in regard to some action which may infringe upon a protected right of an individual. *Goldberg* vs. *Kelly,* 397 U.S. 254 (1970). While the due process clause restricts or limits government activity in many areas, there are, nevertheless, actions which state government may undertake without such restriction. *Goldberg* vs. *Kelly,* 397 U.S. 254, 263, n. 10 (1970). Thus, this Court has consistently made it clear that in examining governmental action in light of a claim that an individual has been denied procedural due process of law, the initial consideration is to determine whether the claimant has a protectable interest to which due process guarantees will attach. *Goldberg* vs. *Kelly,* 397 U.S. 254, (1970); *Bishop* vs. *Wood,* 426 U.S. 341 (1976); *Mathews* vs. *Eldridge,* 424 U.S. 319 (1976).

Appellant asserts that the defendants have deprived it of a property interest protected by the United States Constitution without providing it due process of law. Appellant, like the Illinois Supreme Court, recognizes that property interests are created not by the Constitution itself, but by state law. (Jurisdictional Statement, p. 9; *Polyvend* vs. *Puckorius,* 77 Ill. 2d 287, 294 (1979)). This Court has recognized that "the range of interests protected by procedural due process is not infinite." *Board of Regents* vs. *Roth,* 408 U.S. 564, 570, (1972). Furthermore, this Court has consistently held that the existence of such protected property interests must be derived from state law:

> Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits that support claims of entitlement to those benefits. *Board of Regents* vs. *Roth,* 408 U.S. 564, 577 (1972).

That expression by the *Roth* Court does not stand alone, but has been reiterated in numerous decisions of this Court. *Perry* vs. *Sinderman,* 408 U.S. 593 (1972); *Goss* vs. *Lopez,* 419 U.S. 565 (1975); *Bishop* vs. *Wood,* 426 U.S. 341 (1976); *Leis* vs. *Flynt,* ____ U.S. ____, 58 L.Ed 2d 717, 721 (1979). Thus, before appellant can claim a violation of procedural due process guarantees, it must establish that it has been deprived of some property interest created by state law.

In this case, the Illinois Supreme Court determined that under Illinois law, the interests of prospective bidders on government contracts do not rise to the level of a property interest protectable by the due process clause of the United States Constitution. *Polyvend* vs. *Puckorius,* 77 Ill. 2d 287, 294-295, (1979). Because the existence of a property right is determined by state law (*Board of Regents* vs. *Roth, supra*), Appellees submit that the holding of the Illinois Supreme Court that Appellant does not have a property interest in future state contracts is controlling. Even assuming however, that the Illinois Supreme Court's interpretation of Illinois law is not dispositive, that Court's interpretation is consistent with the teachings of this Court in determining the existence or non-existence of a property interest.

> To have a property interest in a benefit, a person *clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it.* He must have *a legitimate claim of entitlement to it.*
>
> *Board of Regents* vs. *Roth,* 408 U.S. 564, 577 (1972) (emphasis added)
>
> [t]he Fourteenth Amendment's procedural protection of property is a safeguard of security of interests that a person *has already acquired* in specific benefits.
>
> *id* at 576 (emphasis added)

The Illinois Supreme Court has long subscribed to the same proposition that interests protected under the due process clause must be more than mere expectations unilaterally created by an individual's desire. *Sangamon County Fair, etc.* vs. *Standard,* 9 Ill. 2d 267 (1956); *Jordan* vs. *Metropolitan Sanitary District,* 15 Ill. 2d. 369 (1959); *Levin* vs. *Civil Service Commission, Cook County,* 52 Ill. 2d 516 (1972); *Powell* vs. *Jones,* 56 Ill. 2d 70 (1973). In the present case, the Illinois Supreme Court, after reviewing the criteria for determining the existence of a property interest stated:

> We do not think it can be said that plaintiff had "a legitimate claim of entitlement" to the future State contract involved herein. This conclusion is derived from an examination of relevant State law as well as the circumstances surrounding the bid itself. As the court stated in *Roth:*
>
> "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits" (408 U.S. 564, 577, 33 L.Ed. 548, 561, 92 S.Ct. 2701, 2709).
>
> (Citations omitted)
>
> *Polyvend* vs. *Puckorius,* 77 Ill.2d at 294-295 (quotes in original)

The Court went on to consider the various provisions of Illinois law and regulations, the advertisements for bid and Appellant's own bid proposal:

> Section 4 of the Illinois Purchasing Act (Ill.Rev.Stat. (1977), Ch. 27, par. 132.4), which concerns advertisement for bids, expressly states that "[a]ny and all bids may be rejected***." Furthermore, section 17, paragraph (h), of the Department of Administrative Services' Purchasing Rules and Regulations, issued pursuant to the Illinois Purchasing Act, provides that, if it appears to be in the best interest of the State, all bids may be rejected. Finally, both the advertisement for bids and the instructions to bidders in the instant case contained explicit language providing that the State reserved the right to reject any or all bids. Therefore, it seems clear that there was no intention to confer a "claim of entitlement" on bidders for government contracts. Absent such an interest, it cannot be said that the bidders have a recognizable property right within the meaning of the Federal or State Constitutions.
>
> (*id* at p. 295. quotes in original)

Furthermore, it has long been recognized by this Court that prospective suppliers of goods and services, absent specific legislation to the contrary, have no protected interest in government purchasing decisions. *Perkins* v. *Lukens Steel Co.,* 310 U.S. 113 (1940); *Goldberg* vs. *Kelly,* 397 U.S. 254, 263 n.10 (1970). Illinois courts and federal courts interpreting Illinois law have recognized that the *Perkins* doctrine is applicable to state purchasing decisions. *Polyvend* vs. *Puckorius,* 77 Ill. 2d 287, 296, 297, (1979); *Alfred Engineering* vs. *F.E.P.C.,* 19 Ill. App. 3d 592, 601 (1974); *Southern Illinois Builders Association* vs. *Ogilvie,* 327 F.Supp. 1154 (S.D. Ill. 1971). It is thus clear beyond debate that under Illinois law a prospective supplier of goods to the government, like Appellant, has no protected property interest in receiving future State of Illinois contracts. Because it is so well settled by this Court and by the courts of Illinois that a unilateral expectation of receiving future state contracts is not a protected property interest, this appeal fails to raise a substantial federal question. In fact, because the existence of a protected property interest is purely a matter of state law, the attempted review of the Illinois Supreme Court's decision presents no federal question at all.

Appellant's jurisdictional statement also raises, for the first time, the contention that Section 10-1 has deprived it of some liberty interest protected under the due process clause. Because this contention was not presented to either the trial or reviewing state courts and was therefore not considered by the Illinois Supreme Court, it should not now be considered. *Fuller* vs. *Oregon,* 417 U.S. 40, 51 n.11 (1974); *Street* vs. *New York,* 394 U.S. 576, 582 (1968). Even assuming appellant can now raise this issue for the first time, no substantial federal question is presented. This Court has authoritatively rejected such a claim in all cases where similar claims have been made. In *Bishop* vs. *Wood,* 426 U.S. 341, 348 (1976) quoting *Board of Regents* vs. *Roth,* 408 U.S. 564, 575 (1972) the Court stated:

> . . . it would stretch the concept to far to suggest that a person is deprived of 'liberty' when he is simply not retained in one position but remains as free as before to seek another.

See also Greene vs. *McElroy,* 360 U.S. 474 (1959). Appellant Polyvend Inc. has not been foreclosed or prohibited from conducting any business by the Appellees' rejection of its bid under the provisions of Section 10-1. Rather, it remains as free as before to carry on its business as it deems best. Thus, under the previous decisions of this Court, Appellant's liberty issue presents no substantial federal question warranting further argument.

II.

SECTION 10-1 OF THE ILLINOIS PURCHASING ACT IS NOT IMPERMISSIBLY VAGUE OR INDEFINITE.

Appellant also contends that the decision of the Illinois Supreme Court should be reviewed because Section 10-1 violates due process of law in that it is vague and indefinite. Incredibly, Appellant contends that a substantial federal question is presented by its selection of three phrases within the statute and a series of inquiries into what those phrases may

mean. Such a ploy must be rejected for it presents no questions worthy of consideration. This Court and the Illinois Supreme Court have long established the test to be used in determining whether a statute is impermissibly vague and indefinite under the due process provisions of the United States Constitution. A statute is unconstitutionally vague only if men of ordinary intelligence must necessarily guess at its meaning and differ as to its application. *Bouie* v. *City of Columbia,* 378 U.S. 347 (1964); *People* v. *Palks,* 52 Ill. 2d 427 (1973). Furthermore, it is clear that courts cannot, and do not, require that a statute be more specific than is possible within the limitations of the language. *Jordan* v. *De George,* 341 U.S. 223 (1951); *Wadlington* v. *Mindes,* 45 Ill.2d 447, 457 (1971). Section 10-1 is sufficiently clear and certain to be understood by men of common intelligence, exercising ordinary common sense.

Appellant's use of questionable hypotheticals does nothing to establish that Section 10-1 is unconstitutionally vague. They do however, point out the major weakness of its claim. Appellant's rhetorical questions serve to emphasize the hypothetical nature of Appellant's claim. Because the Appellant cannot claim that Section 10-1 is vague and indefinite as it relates to it, it speculates that as to some other entity it may be vague. As this Court recognized in *Broadrick* v. *Oklahoma,* 413 U.S. 601, 610 (1973):

> Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court.

This Court has also long recognized that speculation as to what the words and phrases of a statute may mean as applied to others does nothing to support an argument by a litigant that the statute denies it due process. Quoting Mr. Justice Holmes in

United States v. *Wurzbock,* 280 U.S. 396 (1930), the *Broadrick* Court stated, "If there is any difficulty . . . it will be time enough to consider it when raised by someone whom it concerns" (413 U.S. 601, 609, 1973). In *Broadrick,* this Court went on to recognize that:

> [*T*]*here are limitations in the English language with respect to being both specific and manageably brief,* and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest. *Moreover, even if the outermost boundaries of § 818 may be imprecise, any such uncertainty has little relevance here, where appellant's conduct falls squarely within the 'hard core' of the statute's proscriptions . . . id, 413 U.S. at 608 (Emphasis added).*

It can thus be seen that under the holdings of this Court and the Illinois Supreme Court no federal question of any substance is presented by Appellant's vagueness claim. Using Appellant's own examples it is beyond doubt that, as to it, Section 10-1 is precise and definite. It cannot be contested that the president of a corporation, also its controlling shareholder, is "a responsible officer" of the corporation; or that a corporation is a "business entity;" or that a conviction entered upon a plea of guilty to an indictment is "an admission of guilt. (see Jurisdictional Statement, pp. 6, 7)." Plaintiff is "squarely within the 'hard core' of the statute" and its claim that as to others the statute may be less definite fails to raise a substantial federal question on appeal.

III.

SECTION 10-1 OF THE ILLINOIS PURCHASING ACT DOES NOT CONSTITUTE AN UNLAWFUL BILL OF ATTAINDER

Appellant's contention that Section 10-1 is an unconstitutional bill of attainder, like its other arguments, fails to constitute a substantial federal question. A bill of attainder is a legislative act which inflicts punishment without a judicial trial. (*United States* v. *Lovett,* 328 U.S. 303, 315 (1946). Section 10-1 neither determines guilt nor proscribes any punishment; rather it is a self-imposed restriction upon the purchasing agents of state government. It is not a restraint or punishment on contractors.

The Illinois Purchasing Act, Ill.Rev.Stat. (1977 ch. 127, § 131 *et seq.*, regulates the annual expenditure of millions of dollars in public funds. The limitations and restrictions contained in that Act, including those in Section 10-1, are aimed at regulating the expenditure of those funds, not at punishing any prospective suppliers of goods and services. It is this distinction that separates a valid regulatory statute from a bill of attainder. *DeVeau* v. *Braisted,* 363 U.S. 144, 160 (1960). Furthermore, this Court has recently recognized that an Act does not run afoul of the Constitution's bill of attainder clause merely because it imposes burdensome consequences. *Nixon* v. *Administrator of General Services,* 433 U.S. 425 (1977). Rather, a functional analysis is required to determine whether the challenged legislation is a bill of attainder. It is the intent and purpose of the Act which must be examined:

> The Court, therefore, often has looked beyond mere historical experience and has applied a functional test of the existence of punishment, analyzing whether the law under challenge, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes. (433 U.S. at 475, 476).

The mere fact that Section 10-1 required the rejection of Appellant's bid does not render it a bill of attainder. Section 10-1 clearly furthers valid non-punitive legislative purposes in regulating a basic governmental concern, the expenditure of public funds. Accordingly, Section 10-1 cannot be likened to a bill of attainder.

CONCLUSION

WHEREFORE, for all the reasons set forth above, Appellees, THEODORE D. PUCKORIUS, and the ILLINOIS DEPARTMENT OF ADMINISTRATIVE SERVICES pray that this Court dismiss this appeal for want of a substantial federal question or in the alternative, affirm the decision of the Illinois Supreme Court.

Respectfully submitted,

WILLIAM J. SCOTT
Attorney General of the State of Illinois
160 North LaSalle Street, Room 900
Chicago, Illinois 60601 (793-3500)

Attorney for Defendants-Appellees.

MICHAEL J. HAYES,
JEROME J. WEBB,
ROBERT ORMAN,
Assistant Attorneys General
160 North LaSalle Street, Room 850
Chicago, Illinois 60601 (793-3587)

Of Counsel.

APPENDIX

(No. 51011.—Appellate court reversed; circuit court affirmed.)

POLYVEND, INC., Appellee, v. THEODORE PUCKORIUS, Director of Administrative Services, *et al.*, Appellants.

Opinion filed October 2, 1979.

1. CONSTITUTIONAL LAW—*procedural due process guarantees are operative only where deprivation of life, liberty or property is actual or threatened.* The constitutional guarantees of procedural due process become operative only where there is an actual or a threatened impairment or deprivation of life, liberty or property (U.S. Const., amend. XIV; Ill. Const. 1970, art. I, sec. 2). (Pp. 293-94.)

2. CONSTITUTIONAL LAW—*the starting point in a procedural due process analysis is whether there is a protectable interest.* The starting point in any procedural due process analysis is a determination whether a protectable interest is present. (P. 294.)

3. PUBLIC CONTRACTS—*the opportunity to enter into government contracts is not protected by procedural due process.* The opportunity to contract for the sale of goods and services to the government is not a legally protected property interest within the ambit of the due process clause, and it cannot be said that this interest may not be eliminated without affording a would-be supplier the minimal guarantees of procedural due process. (Pp. 293-94.)

4. CONSTITUTIONAL LAW—*procedural due process protects property interests to which a person has a legitimate claim of entitlement or in which an interest has already been acquired.* The fourteenth amendment's procedural due process protection extends to property interests that a person has already acquired in specific benefits or to which he has a legitimate claim of entitlement. (P. 294.)

5. CONSTITUTIONAL LAW—*property interests are not constitutionally created, but stem from an independent source, such as State law.* Property interests are not constitutionally created, but stem from independent sources, such as State law. (Pp. 294-95.)

6. PUBLIC CONTRACTS—*there is no claim of entitlement to a government contract where statutes, agency regulations and advertisements for bids make it clear that the State has the right to reject any bid—due process.* For purposes of procedural due process, it cannot be said that there is an intent to confer a "claim of entitlement" on bidders for government contracts where the Illinois Purchasing Act expressly states that "[a]ny and all bids may be rejected" (Ill. Rev. Stat. 1977, ch. 127, par. 132.4), purchasing rules and regulations of the Department of Administrative Services provide that all bids may be rejected in the best interest of the State, and where advertisements for bids and instructions to bidders explicitly reserve the right to reject any and all bids. (P. 295.)

7. PUBLIC CONTRACTS—*awards of State contracts in prior years do not confer a property interest that is protectable by due process.* Awards of license plate contracts in prior years may create a vendor's unilateral expectation that he will receive upcoming awards, but this expectation does not constitute a protectable property interest within the meaning of the due process clause. (Pp. 296-98.)

8. PUBLIC CONTRACTS—*a contract award in a particular year does not create a right to future State contracts.* Being awarded a contract in a given year does not give rise to any right or interest in future State contracts. (P. 298.)

9. PUBLIC CONTRACTS—*the statute barring State contract awards to those who have been involved in bribery of State agents does not infringe a property right so as to deny due process.* Section 10.1 of the Illinois Purchasing Act provides that "[n]o person or business entity shall be awarded a contract or sub-contract if that person or business entity: (a) has been convicted of bribery or attempting to bribe an officer or employee of the State ***; or (b) has made an admission of guilt of such conduct ***" (Ill. Rev. Stat. 1977, ch. 127, par. 132.10—1), and this statute does not deprive prospective government contractors of due process, since potential contract bidders have no recognized property rights in future government contracts in Illinois. (Pp. 299.)

10. CONSTITUTIONAL LAW—*due process is violated if a statute is vague, indefinite or uncertain, or delegates administrative authority without sufficient standards.* Due process requirements are violated if a statute is vague, indefinite or uncertain, or fails to provide sufficient standards to guide an administrative body which is to exercise functions delegated by the statute. (P. 299.)

11. CONSTITUTIONAL LAW—*a statute is unconstitutionally vague if persons of common intelligence must guess at its meaning and differ as to its application.* The standard to be applied in determining whether a statute is unconstitutionally vague is whether its terms are so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application. (Pp. 299-300.)

12. CONSTITUTIONAL LAW—*statutory terms may withstand a vagueness attack if they are commonly used and understood, even though not defined in the statute.* Statutory terms may withstand a vagueness attack even if they are not defined in the statute if they seem to be words that are commonly used and understood. (P. 300.)

13. PUBLIC CONTRACTS—*the statute barring State contracts to those who have been involved in bribery of State agents is not unconstitutionally vague.* The provision of the Illinois Purchasing Act which states that "[n]o person or business entity shall be awarded a contract or sub-contract if that person or business entity: (a) has been convicted of bribery or attempting to bribe an officer or employee of the State of Illinois in that officer or employee's official capacity; or (b) has made an admission of guilt of such conduct which is a matter of record ***," and which further provides a business entity shall be chargeable with the conduct of its official, agent or employee acting on its behalf and pursuant to the "direction or authorization of a responsible official thereof" (Ill.

Rev. Stat. 1977, ch. 127, par. 132.10–1), is not unconstitutionally vague, since the terms involved are commonly used and understood, even though not defined in the statute, and persons of common intelligence do not have to guess at the meaning of such everyday words as "business entity" or "admission of guilt". (Pp. 299-300.)

14. ADMINISTRATIVE LAW—*intelligible standards must be set to guide an agency charged with enforcement of a statute, but absolute criteria for every detail are not required.* The State Constitution requires that intelligible standards be set to guide an agency charged with enforcement of a statute, but the legislature need not establish absolute criteria covering every detail necessary to that enforcement. (P. 300.)

15. ADMINISTRATIVE LAW—*a statute delegating administrative authority must sufficiently identify the persons and activities to be regulated, the harm to be prevented, and the means to be used.* A legislative delegation of authority must provide sufficient identification of the persons and activities potentially subject to regulation, the harm sought to be prevented, and the general means to be available to the administrator to prevent the identified harm. (P. 300.)

16. PUBLIC CONTRACTS—*the statute barring State contracts to those who have been involved in bribery of State agents meets constitutional standards for delegation of authority.* Section 10.1 of the Illinois Purchasing Act (Ill. Rev. Stat. 1977, ch. 127, par. 132.10–1), which provides that State contracts may not be awarded to persons or business entities convicted of bribing or attempting to bribe State agents (Ill. Rev. State. 1977, ch. 127, par. 132.10–1), precludes the exercise of unbridled agency discretion by the Department of Administrative Services and meets the constitutional standards for delegation of authority to an agency. (P. 300.)

17. PUBLIC CONTRACTS—*a vendor may be denied a State contract on the basis of an involvement in bribery that preceded the effective date of the statute forbidding such awards.* The Illinois Purchasing Act forbids the award of a State contract to a vendor convicted of bribery or attempted bribery of a State agent, or who has made an admission of such conduct (Ill. Rev. Stat. 1977, ch. 127, par. 132.10–1), and while this statute does not affect procurement decisions occurring prior to its effective date of October 1, 1977, acts of bribery occurring prior to that date may be considered in applying the statute, and this construction does not offend section 4 of the statutory construction act, which provides that "[n]o new law shall be construed *** in any way whatever to

affect any such offense or act so committed or done *** before the new law takes effect" (Ill. Rev. Stat. 1975, ch. 131, par. 4), since this provision protects only vested rights, and a potential government contractor does not have a vested right in future government contracts. (P. 301.)

18. BILL OF ATTAINDER—*a bill of attainder is legislation imposing punishment without a judicial trial.* A bill of attainder has been defined as a legislative act which inflicts punishment without a judicial trial. (P. 301.)

19. BILL OF ATTAINDER—*the Illinois Purchasing Act is not a bill of attainder.* The Illinois Purchasing Act cannot be called a bill of attainder merely because it forbids the award of a State contract to one who "has been convicted of bribery or attempting to bribe an officer or employee of the State" (Ill. Rev. Stat. 1977, ch. 127, par. 132.10–1), since this statutory prohibition is clearly activated by a judicial determination of guilt. (Pp. 301-03.)

20. CORPORATIONS—*a corporation may act only through its officers, directors or employees.* The only way that a corporation can act is through its officers, directors or employees. (P. 302.)

21. PUBLIC CONTRACTS—*the statute barring State contracts to those who have been involved in bribery of State agents is civil rather than criminal.* Section 10.1 of the Illinois Purchasing Act, which forbids the award of State contracts to individuals or business entities who have been convicted of bribery or attempting to bribe State employees or officials or who have admitted such conduct (Ill. Rev. Stat. 1977, ch. 127, par. 132.10–1) is a civil rather than a criminal statute, and a vendor barred from a State contract by reason of this provision is not accused of criminal activity. (P. 303.)

22. STATUTES—*a statute is presumed to be a valid enactment and the burden of establishing constitutional invalidity is on a challenging party.* A statute is presumed to be a valid enactment, and the burden is on a party challenging it to establish constitutional invalidity. (P. 303.)

CLARK, J., concurring.

Appellate citation: 61 Ill. App. 3d 163.

Appeal from the Appellate Court for the First District; heard in that court on appeal from the Circuit Court of Cook County, the Hon. Arthur L. Dunne, Judge, presiding.

William J. Scott, Attorney General, of Springfield (Michael J. Hayes, Jerome J. Webb, and Robert Orman, Assistant Attorneys General, and Peter Erlinder, law student, of Chicago, of counsel), for appellants.

Foran, Wiss & Schultz, of Chicago (Richard G. Schultz and Nicholas J. Etten, of counsel), for appellee.

MR. JUSTICE UNDERWOOD delivered the opinion of the court:

Plaintiff, Polyvend, Inc., filed this declaratory judgment action in October 1977 following defendants' rejection of its bid to manufacture the 1979 multiyear motor vehicle license plates for the State of Illinois. Plaintiff's bid, which was the only one submitted on this project, was rejected by the State pursuant to section 10.1 of the Illinois Purchasing Act (Ill. Rev. Stat. 1977, ch. 127, par. 132.10–1), which became effective October 1, 1977. That section provides:

> "No person or business entity shall be awarded a contract or sub-contract if that person or business entity: (a) has been convicted of bribery or attempting to bribe an officer or employee of the State of Illinois in that officer or employee's official capacity; or (b) has made an admission of guilt of such conduct which is a matter of record but has not been prosecuted for such conduct.
>
> For purposes of this Section, where an official, agent, or employee of a business entity committed the bribery or attempted bribery on behalf of such an entity and pursuant to the direction or authorization of a responsible official thereof, the business entity shall be chargeable with the conduct."

Plaintiff challenged the statute on various constitutional grounds: (1) section 10.1 denies procedural due process of law; (2) the statute is unconstitutionally vague and indefinite; (3) the statute constitutes a bill of attainder; (4) it invalidly delegates legislative power to an administrative official; and (5) section 10.1 cannot be

retrospectively applied to a prior bribery conviction. The circuit court rejected these arguments and granted defendants' motion for summary judgment. The appellate court, reaching only one of the issues, reversed and remanded, finding the statute unconstitutional on due process grounds. (61 Ill. App. 3d 163.) We allowed defendants' petition for leave to appeal.

Plaintiff is an Arkansas corporation engaged in the manufacture of license plates and authorized to transact business in Illinois. Responding to an advertisement by the Illinois Department of Administrative Services for bids on the contract to manufacture the 1979 multiyear license plates, plaintiff submitted a bid in the amount of $10,390,440.40, signed by Patrick J. Stoltz as president of the plaintiff corporation. In 1974, Stoltz had pleaded guilty in Federal district court to a charge of bribery. This conviction arose out of Stoltz' activities as president of Metal Stamping Corp., the sole owner of Polyvend, and involved the bribery of an Illinois official.

In 1973, Stoltz resigned as president of the Metal Stamping Corp., and the following year Polyvend was merged into Metal Stamping Corp. The name of the corporation subsequently was changed to that of its former subsidiary, Polyvend. Despite Stoltz' resignation as president of the corporation, he apparently continued to hold a controlling interest in the firm at the time the bid was submitted. Metal Stamping Corp. was awarded the contract to manufacture the Illinois license plates in 1976 and 1977, and Polyvend was awarded the 1978 contract. Although Polyvend submitted the only bid to manufacture the 1979 plates, it was rejected by defendant pursuant to the above-quoted statutory provision. Stoltz died in December 1978.

It is fundamental that the constitutional guarantees of procedural due process only become operative where there is an actual or threatened impairment or deprivation of

"life, liberty or property." (U.S. Const., amend. XIV; Ill. Const. 1970, art. I, sec. 2.) Therefore, the starting point in any procedural due process analysis is a determination of whether one of these protectable interests is present, for if there is not, no process is due. Plaintiff argues that the opportunity to contract for the sale of goods and services to the government is a legally protected property interest within the ambit of the due process clause and, therefore, cannot be eliminated without affording the would-be supplier minimal guarantees of procedural due process. With this contention, however, we disagree.

As the United States Supreme Court recognized in *Board of Regents v. Roth* (1972), 408 U.S. 564, 570, 33 L. Ed. 2d 548, 556-57, 92 S. Ct. 2701, 2705, "the range of interests protected by procedural due process is not infinite." Following a review of the pertinent judicial decisions, the *Roth* court concluded that, "[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." (408 U.S. 564, 577, 33 L. Ed. 2d 548, 561, 92 S. Ct. 2701, 2709.) Stated differently, "[t]he Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person *has already acquired* in specific benefits." (Emphasis added.) 408 U.S. 564, 576, 33 L. Ed. 2d 548, 560, 92 S. Ct. 2701, 2708.

We do not think it can be said that plaintiff had "a legitimate claim of entitlement" to the future State contract involved herein. This conclusion is derived from an examination of relevant State law as well as the circumstances surrounding the bid itself. As the court stated in *Roth*:

> "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." (408 U.S. 564, 577, 33 L. Ed. 2d 548, 561, 92 S. Ct. 2701, 2709.)

(See also *Bishop v. Wood* (1976), 426 U.S. 341, 344, 48 L. Ed. 2d 684, 689-90, 96 S. Ct. 2074, 2077; *Goss v. Lopez* (1975), 419 U.S. 565, 572-73, 42 L. Ed. 2d 725, 733-34, 95 S. Ct. 729, 735.) Section 4 of the Illinois Purchasing Act (Ill. Rev. Stat. 1977, ch. 127, par. 132.4), which concerns advertisement for bids, expressly states that "[a]ny and all bids may be rejected ***." Furthermore, section 17, paragraph (h), of the Department of Administrative Services' Purchasing Rules and Regulations, issued pursuant to the Illinois Purchasing Act, provides that, if it appears to be in the best interest of the State, all bids may be rejected. Finally, both the advertisement for bids and the instructions to bidders in the instant case contained explicit language providing that the State reserved the right to reject any or all bids. Therefore, it seems clear that there was no intention to confer a "claim of entitlement" on bidders for government contracts. Absent such an interest, it cannot be said that the bidders have a recognizable property right within the meaning of the Federal or State constitutions.

Analogous to the contractor's interest in receiving future government contracts is the interest of an individual in government employment. In *Roth* an assistant professor at a State university brought an action in which he alleged that the decision of the university not to renew his teaching contract for another year violated his right to procedural due process of law. The plaintiff had been hired for a fixed term of one academic year and had no tenure rights to continued employment. The plaintiff argued that he should have been given notice of any reason for

nonretention and an opportunity for a hearing. After examining the terms of the plaintiff's employment agreement with the university, however, the United States Supreme Court concluded that while he may have had "an abstract concern in being rehired" (408 U.S. 564, 578, 33 L. Ed. 2d 548, 561, 92 S. Ct. 2701, 2710), he did not have a claim of entitlement to reemployment. Therefore, the plaintiff lacked the requisite property interest necessary to require the university to comply with procedural due process requirements. See also *Yeley v. Bartonville Fire & Police Com.* (1979), 77 Ill. 2d 271.

Similarly, in the present case, despite the fact that plaintiff had been the successful bidder in 1976, 1977 and 1978, and had manufactured the State license plates in those years, it did not have a claim of entitlement or protectable property interest in the 1979 license plate contract. Each contract with the State was separate and independent from the other, and prior performance of a like contract did not give the contractor a preferred status or any other reasonable basis for concluding that it would receive future contracts. Polyvend's "unilateral expectation" that it would receive the contract to manufacture the 1979 Illinois motor vehicle license plates does not constitute a protectable property interest within the meaning of the due process clause. *Board of Regents v. Roth* (1972), 408 U.S. 564, 577, 33 L. Ed. 2d 548, 560-61, 92 S. Ct. 2701, 2709.

In *Perkins v. Lukens Steel Co.* (1940), 310 U.S. 113, 84 L. Ed. 1108, 60 S. Ct. 869, the United States Supreme Court held that bidders on government contracts lack a sufficient legal interest to challenge government procurement rules and policies. Although the case was decided on principles of standing, we think the reasoning employed by the court therein is equally pertinent to the present controversy. In *Perkins*, the court stated:

> "'Like private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases.' (310 U.S. 113, 127, 84 L. Ed. 1108, 1114, 60 S. Ct. 869, 876.) 'Courts should not, where Congress has not done so, subject purchasing agencies of Government to the delays necessarily incident to judicial scrutiny at the instance of potential sellers, which would be contrary to traditional governmental practice and would create a new concept of judicial controversies. A like restraint applied to purchasing by private business would be widely condemned as an intolerable business handicap. It is, as both Congress and the courts have always recognized, essential to the even and expeditious functioning of Government that the administration of the purchasing machinery be unhampered.' 310 U.S. 113, 130, 84 L. Ed. 1108, 1116, 60 S. Ct. 869, 878.

See also *Powell v. Jones* (1973), 56 Ill. 2d 70, 82.

The decisions which plaintiff relies on, and which the appellate court cited in support of its conclusion that plaintiff had a protectable property interest, are not persuasive. In *Bio-Medical Laboratories, Inc. v. Trainor* (1977), 68 Ill. 2d 540, the plaintiff, a medical laboratory, was informed by the Director of the Illinois Department of Public Aid that it was going to be suspended from further participation in the Medicaid program. The plaintiff thereupon filed suit seeking to restrain the Director from taking such action. In response to the Director's contention that the plaintiff lacked standing to bring such an action because of the absence of a protectable interest, this court distinguished *Perkins v. Lukens Steel Co.* (1940), 310 U.S. 113, 84 L. Ed. 1108, 60 S. Ct. 869, by pointing

out that, whereas in *Perkins* the government contractors were unable to demonstrate that a legal right had been threatened, this plaintiff did possess a protectable legal interest, "that being its expectation of continuing to receive Medicaid payments on behalf of the Medicaid recipients it services." 68 Ill. 2d 540, 547.

This right to continuing participation in an ongoing program, which was recognized as a protectable legal right by the court, arose by virtue of the fact that the plaintiff had participated in the Medicaid program for approximately eight years prior to the decision of the Director to suspend. The program was a continuing one, not requiring annual competitive bids, in direct contrast with the present case, where plaintiff was not a participant in an ongoing, continuous program. Rather, there was simply an annual invitation to bid and a resulting annual award of the license plate contract. Being awarded the contract in a given year did not give rise to any right or interest in future State contracts, which were entirely independent matters. While plaintiff may have had "an abstract concern" in being awarded the 1979 license plate contract, it certainly did not have a legally protectable property interest and, absent such an interest, a prospective government contractor's bid does not trigger due process safeguards.

Nor are we persuaded by *Gonzalez v. Freeman* (D.C. Cir. 1964), 334 F.2d 570. In *Gonzalez*, the plaintiff corporation, which had a record of contractual relations with the Commodity Credit Corporation for a number of years, was temporarily debarred from doing business with Commodity Credit. Plaintiff was not given any grounds for the five-year debarment and was not provided an opportunity for a hearing. Although the court did determine that the plaintiff was entitled to some procedural safeguards, including notice of specific charges and an opportunity to present evidence and to cross-examine adverse

witnesses, this finding was based solely upon an interpretation of the Commodity Credit Corporation Charter Act (15 U.S.C. sec. 714 (1970)) and the Administrative Procedure Act (5 U.S.C. sec. 551 *et seq.* (1970)). In fact, the court explicitly refrained from deciding the constitutional question of whether the debarment violated the plaintiff's right to due process. Consequently, *Gonzalez* is neither controlling nor persuasive here.

Section 10.1 clearly was enacted by the legislature in an effort to insure that those individuals and corporations who have demonstrated a lack of integrity in the past when dealing with the State not be permitted to transact business with the State in the future. While the statute certainly deals effectively with those individuals and businesses who have bribed or attempted to bribe State officials or employees, it cannot be said to deprive prospective government contractors of due process since those bidders have no recognized property rights in future government contracts in Illinois.

Nor do we think that this statute suffers from any of the other constitutional infirmities suggested by plaintiff. It is argued, for example, that section 10.1 is unconstitutionally vague and constitutes an invalid delegation of legislative power to an administrative official. Plaintiff specifically objects to the statutory phrases "business entity," "in that officer or employee's official capacity," "admission of guilt," "matter of record," and "direction or authorization of a responsible official."

It is clear that due process of law "requires that an act shall not be vague, indefinite or uncertain, and must provide sufficient standards to guide the administrative body in the exercise of its functions." (*People ex rel. Stamos v. Public Building Com.* (1968), 40 Ill. 2d 164, 174.) The standard which we have applied in the past in determining whether a statute is unconstitutionally vague is whether the terms of the statute are so vague that

persons of common intelligence must necessarily guess at its meaning and differ as to its application. (*People v. Palkes* (1972), 52 Ill. 2d 472, 475; *Hershey Manufacturing Co. v. Adamowski* (1961), 22 Ill. 2d 36, 43-44.) We do not believe that section 10.1 is such a statute. Although the phrases which plaintiff objects to are not defined in the statute, they seem to be commonly used and understood words. We do not think it can be said that persons of common intelligence would have to guess at the meaning of such everyday words as "business entity" or "admission of guilt."

Nor do we think that this statute invalidly delegates legislative power to an administrative official. As this court stated in *Hill v. Relyea* (1966), 34 Ill. 2d 552, 555:

> "Absolute criteria whereby every detail necessary in the enforcement of a law is anticipated need not be established by the General Assembly. The constitution merely requires that intelligible standards be set to guide the agency charged with enforcement ***."

More specifically, we held in *Stofer v. Motor Vehicle Casualty Co.* (1977), 68 Ill. 2d 361, 372, that, in delegating its authority, the legislature must "provide sufficient identification of the following:

> (1) The *persons* and *activities* potentially subject to regulation;
>
> (2) The *harm* sought to be prevented; and
>
> (3) The general *means* intended to be available to the administrator to prevent the identified harm."

We believe that section 10.1 clearly satisfies these requirements and, therefore, precludes the type of unbridled agency discretion feared by plaintiff.

Furthermore, we reject plaintiff's contention that section 10.1 is being applied retrospectively in violation of plaintiff's constitutional rights. Plaintiff relies upon section 4 of the Illinois statutory construction act, which provides:

> "No new law shall be construed *** in any way whatever to affect any such offense or act so committed or done, or any penalty, forfeiture or punishment so incurred *** before the new law takes effect ***." (Ill. Rev. Stat. 1975, ch. 131, par. 4.)

Plaintiff argues that by refusing to award the 1979 license plate contract to Polyvend because of Stolz' 1974 conviction, the State is violating section 4 of the statutory construction act and is ignoring numerous Illinois decisions which require new statutes to apply prospectively only. We do not agree.

First of all, section 10.1 was not, in our judgment, applied retroactively to plaintiff. The Act became effective on October 1, 1977, and was applied prospectively to future procurement decisions. While the law did take cognizance of past acts, it did not affect procurement decisions occurring prior to October 1, 1977. Secondly, section 4 of the statutory construction act only protects "vested rights." (*Orlicki v. McCarthy* (1954), 4 Ill. 2d 342, 346.) As we concluded in the context of plaintiff's procedural due process argument, plaintiff does not have a vested right to future government supply contracts. Absent such an interest, plaintiff's argument that the statute violates section 4 of the statutory construction act fails.

Finally, plaintiff contends that section 10.1 is an unconstitutional bill of attainder. A bill of attainder has been defined as "a legislative act which inflicts punishment without a judicial trial." (*United States v. Lovett* (1946), 328 U.S. 303, 315, 90 L. Ed. 1252, 1259, 66 S. Ct. 1073, 1078.) We do not think that section 10.1 of the Illinois Purchasing Act can be called a bill of attainder. There clearly was a judicial determination of guilt concerning a controlling shareholder and official of the corporation when Stoltz was convicted of bribery in 1974. The

legislative act, section 10.1, simply attributed his guilt to the corporation. This is no different than any other civil or criminal provision which holds a corporation responsible for the acts of its officials. The only way a corporation can act is through its officers, directors and employees.

A similar problem was addressed by the United States Supreme Court in *DeVeau v. Braisted* (1960), 363 U.S. 144, 4 L. Ed. 2d 1109, 80 S. Ct. 1146. In that case, union officials and others challenged the constitutionality of a section of the New York Waterfront Commission Act which provided that no person could solicit or receive dues on behalf of any waterfront union if an officer of such union had been convicted of a felony. As a result of the Act, the International Longshoremen's Association was denied dues solicitation and collection privileges because of an officer's conviction of a felony 36 years earlier. The court, considering the claim that the Act was unconstitutional as a bill of attainder and as an *ex post facto* law, stated:

> "Finally, section 8 of the Waterfront Commission Act is neither a bill of attainder nor an *ex post facto* law. *** Clearly, section 8 embodies no further implications of appellant's guilt than are contained in his 1920 judicial conviction; ***. The question in each case where unpleasant consequences are brought to bear upon an individual for prior conduct, *is whether the legislative aim was to punish that individual for past activity, or whether the restriction of the individual comes about as a relevant incident to a regulation of a present situation* ***. The proof is overwhelming that New York sought not to punish ex-felons, but to devise what was felt to be a much-needed scheme of regulation of the waterfront ***." (Emphasis added.) (363 U.S. 144, 160, 4 L. Ed. 2d 1109, 1120, 80 S. Ct. 1146, 1155.)

Similarly, section 10.1 was devised as a much needed regulation of government procurement policies and cannot be said to constitute a bill of attainder.

Plaintiff's allegation that section 10.1 violates numerous other constitutional guarantees of one who is criminally accused does not merit discussion. Section 10.1 is a civil statute and plaintiff is not being accused of criminal activity.

This statute, like all others, is presumed to be a valid enactment and the burden is on the party challenging it to establish its constitutional invalidity. (*Jaris v. Public School Teachers' Pension and Retirement Fund* (1974), 58 Ill. 2d 15, 19.) In our judgment that burden has not been met. Accordingly, we hold that section 10.1 does not violate any of the constitutional guarantees asserted by plaintiff.

The judgment of the appellate court is accordingly reversed and that of the circuit court is affirmed.

Appellate court reversed;
circuit court affirmed.

MR. JUSTICE CLARK, concurring:

I concur in the result. I do not concur in the majority's view that the *opportunity to bid* is not a protectable property interest necessitating minimal due process guarantees. The majority incorrectly characterizes plaintiff's asserted property interest here as a " 'claim of entitlement' to the future State contract involved herein" (77 Ill. 2d at 294). That is not the situation at all. Of course plaintiff is not entitled to a future State contract: but plaintiff's claimed property interest, requiring due process protection, is the *opportunity* to bid—not entitlement to have the bid accepted.

I agree that *Bio-Medical Laboratories, Inc. v. Trainor* (1977), 68 Ill. 2d 540, 546, and *Gonzalez v. Freeman*

(D.C. Cir. 1964), 334 F.2d 570, 574, are not persuasive. However, *Perkins v. Lukens Steel Co.* (1940), 310 U.S. 113, 125, 84 L. Ed. 1108, 1114, 60 S. Ct. 869, 876, is also inappropriate. These three cases were all initially concerned with standing, which is not an issue here (and which encompasses a lower standard for determination). Moreover, *Bio-Medical* and *Gonzalez* both involved interruption of an existing or continuing relationship, which does not exist here (where the Illinois Department of Administrative Services (hereafter Department) *annually invites* bids to manufacture license plates and could reject any and all bids (Ill. Rev. Stat. 1977, ch. 127, par. 132.4)). Also, *Gonzalez* and *Bio-Medical* were not decided on the basis of due process.

To determine whether due process guarantees are applicable to the circumstances here, as the majority correctly points out, the first step is to establish the existence of a protectable property interest. In *Board of Regents v. Roth* (1972), 408 U.S. 564, 577, 33 L. Ed. 2d 548, 561, 92 S. Ct. 2701, 2709, the Supreme Court stated:

> "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source *such as state law*—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." (Emphasis added.)

(Accord, *e.g.*, *Perry v. Sindermann* (1972), 408 U.S. 593, 602 n.7, 33 L. Ed. 2d 570, 580 n.7, 92 S. Ct. 2694, 2700 n. 7; *Bishop v. Wood* (1976), 426 U.S. 341, 344, 48 L. Ed. 2d 684, 690, 96 S. Ct. 2074, 2077. See *Mackey v. Montrym* (1979), ––– U.S. ––––, 61 L. Ed. 2d 321, 99 S. Ct. 2612.) Analysis of both Illinois statutory and common law compels the conclusion that a right to bid, or more precisely the right to an equal opportunity to bid,

protected by due process if denied, exists. The Illinois Purchasing Act provides:

> "It is the purpose of this Act and is hereby declared to be the policy of the State that the principle of competitive bidding and economical procurement practices shall be applicable to all purchases and contracts by or for any State Agency." (Ill. Rev. Stat. 1977, ch. 127, par. 132.2.)

Again, it provides:

> "That all purchases, contracts and expenditure of funds shall be awarded to the lowest responsible bidder considering conformity with specifications, terms of delivery, quality and serviceability ***." (Ill. Rev. Stat. 1977, ch. 127, par. 132.6(a).)

The primary purpose of these provisions no doubt is to benefit the State; a secondary purpose, but no less important, is to permit anyone, who is responsible and qualified, to compete for a contract. (See *Dement v. Rokker* (1888), 126 Ill. 174, 194-97.) In the absence of statute, the State, of course, "could let contracts without competitive bidding." (*Inskip v. Board of Trustees* (1962), 26 Ill. 2d 501, 512; *Bohleber v. Carmi Township Hospital* (1975), 30 Ill. App. 3d 969, 974.) Once a statute provides for competitive bidding, as does the Illinois Purchasing Act here, a prospective bidder may not simply be denied the opportunity to bid. On this basis, the instant case is distinguishable from *Perkins v. Lukens Steel Co.* (1940), 310 U.S. 113, 84 L. Ed. 1108, 60 S. Ct. 869, above, and distinct from the State's rights under section 4 of the Illinois Purchasing Act: "Any and all bids may be rejected ***." (Ill. Rev. Stat. 1977, ch. 127, par. 132.4.) *Perkins* held that the status of bidder does not result in an interest sufficient to challenge legitimate government regulations a prospective contractor must comply with; and section 4 does not compel the State to accept a bid. Here, however, plaintiff, or any prospective bidder, under section 10.1 of

the Illinois Purchasing Act (Ill. Rev. Stat. 1977, ch. 127, par. 132.10–1), would not even be permitted to acquire the status of bidder (*Perkins*) and would be prevented from submitting a bid (which can then be rejected). Several older cases of this court have held that the statutory requirement of competitive bidding "necessarily implies equal opportunity to and freedom in all whose interests or inclinations might thus impel them to compete at the bidding." (*Dement v. Rokker* (1888), 126 Ill. 174, 196. Accord, *Holden v. City of Alton* (1899), 179 Ill. 318, 324, and *Callaghan & Co. v. Smith* (1922), 304 Ill. 532, 540-41.) The opportunity to bid on a government contract, therefore, is a property right, protected from unfair competition and interference by the State without due process.

By implication, the State's argument that plaintiff has not been permanently debarred, or that section 10.1 does not effect such a result, is mistaken. The State asserts that the bid for only a single contract was rejected, thus implying plaintiff should try again "next year." The record establishes that *one reason* the bid was rejected was section 10.1, set out in full in the majority opinion (77 Ill. 2d at 292). Section 10.1's language is: "No person or business entity shall be awarded a contract ***." The language used is in the nature of a universal denial with no time period or limitation on such preclusion set out.

It is true, as plaintiff maintains, that section 10.1 (Ill. Rev. Stat. 1977, ch. 127, par. 132.10–1) provides for no notice and hearing or other recourse. However, a statute, constitutionally defective in this respect, may be cured by administrative regulations. (*Bell v. Burson* (1971), 402 U.S. 535, 542-43, 29 L. Ed. 2d 90, 96, 91 S. Ct. 1586, 1591; accord, *Pollion v. Lewis* (N.D. Ill. 1971), 332 F. Supp. 777, 778-79.) The Department's "Purchasing Rules and Regulations Covering Procurement of Commodities,

Equipment, Printing, Purchases from Small Businesses, and Guidelines for Procurement of Printing Paper, Stationery and Envelopes" (hereafter Rules) provides for "Rights to Appeal":

> "Any decision rendered by the Procurement Division, Department of General Services [now Department of Administrative Services] pursuant to these Purchasing Rules and Regulations may be appealed to the Director of General Services by filing with him a written statement setting forth all the facts and circumstances together with the basis for making such appeal." (Rules, pt. I, sec. 28.)

(Plaintiff did *not* pursue this appeals route.) Whether this "appeal" is sufficient for due process purposes must be subjected to analysis. Plaintiff denies the Rules' section 28 appeal is sufficient as a "hearing," denies it is adequate because it occurs subsequent to a decision of debarment, and denies it is even correctly applicable to the instant case because the decision here was pursuant, at least partially, to section 10.1 of the Illinois Purchasing Act rather than wholly pursuant to the Rules.

United States Supreme Court decisions, primarily in this decade (beginning with *Goldberg v. Kelly* (1970), 397 U.S. 254, 25 L. Ed. 2d 287, 90 S. Ct. 1011), have shown a propensity towards requiring "some kind of hearing *** at some time before a person is finally deprived of his property interests." (*Wolff v. McDonnell* (1974), 418 U.S. 539, 557-58, 41 L. Ed. 2d 935, 952, 94 S. Ct. 2963, 2975.) What kind of hearing, its nature or the extent of its proceedings has not been clarified by that court. Indeed, the decisions, except in applying their rationales to the facts before them, have been vague, even tolerantly inconsistent—perhaps of necessity given the multitude of circumstances in which due process attaches. (*E.g.*, contrast *Wolff v. McDonnell* (1974), 418 U.S. 539, 41 L. Ed. 2d 935, 94 S. Ct. 2963, *Mitchell v. W. T. Grant Co.* (1974), 416 U.S. 600, 40 L. Ed. 2d 406, 94 S. Ct. 1895,

and *Arnett v. Kennedy* (1974), 416 U.S. 134, 40 L. Ed. 2d 15, 94 S. Ct. 1633, with *Goldberg v. Kelly* (1970), 397 U.S. 254, 25 L. Ed. 2d 287, 90 S. Ct. 1011, *Boddie v. Connecticut* (1971), 401 U.S. 371, 28 L. Ed. 2d 113, 91 S. Ct. 780, and *Mathews v. Eldridge* (1976), 424 U.S. 319, 47 L. Ed. 2d 18, 96 S. Ct. 893. See Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267, 1274 (1975) (hereafter Friendly).) What the Supreme Court has consistently said is that the process due or procedural requisites for a hearing may vary according to the government function and interest involved, the private interest affected by the government action, and the nature of the proceedings; due process in one case may not be satisfactory in another. (*Wolff v. McDonnell* (1974), 418 U.S. 539, 560, 41 L. Ed. 2d 935, 953, 94 S. Ct. 2963, 2977; *Bell v. Burson* (1971), 402 U.S. 535, 540, 29 L. Ed. 2d 90, 95, 91 S. Ct. 1586, 1589; *Boddie v. Connecticut* (1971), 401 U.S. 371, 378-79, 28 L. Ed. 2d 113, 119, 91 S. Ct. 780, 786; *Goldberg v. Kelly* (1970), 397 U.S. 254, 263, 25 L. Ed. 2d 287, 296, 90 S. Ct. 1011, 1018.) Due process " 'is not a technical conception with a fixed content unrelated to time, place and circumstances' " but " 'is flexible and calls for such procedural protections as the particular situation demands.' " (*Mathews v. Eldridge* (1976), 424 U.S. 319, 334, 47 L. Ed. 2d 18, 33, 96 S. Ct. 893, 903.) According to *Mathews*, this necessitates "consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." 424 U.S. 319, 335, 47 L. Ed. 2d 18, 33, 96 S. Ct. 893, 903. See Friendly, 123 U. Pa. L. Rev., 1278; and K. Davis, Administrative Law of the Seventies 266-68 (1976).

The private interest affected here, of course, is plaintiff's right to have the opportunity to bid. As is clear from the cases above, the importance of the right affected has a bearing on the adequacy of the hearing available. Plaintiff's right is not in the nature of a deprivation of personal or real property; nor is it a deprivation of liberty; nor is plaintiff's right to do business interfered with. (There is, of course, no "right" to State contracts (Ill. Rev. Stat. 1977, ch. 127, par. 132.4; *Gonzalez v. Freeman* (D.C. Cir. 1964), 334 F.2d 570, 574).) Plaintiff undoubtedly would not discourage anyone from perceiving its loss of the right to present a bid as a loss of a $10 million contract. However, the loss is strictly only the prevention of participation in competition (for bids), the outcome of which is uncertain. The right which plaintiff possesses then is only to compete with others for a contract. It has no expectation of receiving the contract. If the bidder is *notified* by letter, as here, that its bid is denied pursuant to section 10.1 of the Illinois Purchasing Act, the result is the loss of only that contract for that year—before a party may avail itself of section 28 of the Rules. If the Department has erred, section 28 provides the mechanism for correction. If the Department has not erred, the bidder is debarred permanently. I believe the deprivation here is much less severe than deprivation involving loss of livelihood, liberty or profession (*Goldberg*, *Wolff* and *Bell* respectively).

The "risk of an erroneous deprivation" (*Mathews v. Eldridge* (1976), 424 U.S. 319, 335, 47 L. Ed. 2d 18, 33, 96 S. Ct. 893, 903), pursuant to section 10.1 of the Illinois Purchasing Act and under the Rules' section 28 "hearing" is minimal. Supreme Court decisions in this decade do not dictate the type of hearing and extent of proceedings required. Judge Friendly of the Second Circuit United States Court of Appeals has written:

> "The term 'hearing,' like 'jurisdiction,' is 'a verbal coat of too many colors.' Professor Davis has defined it as 'any oral proceeding before a tribunal.' Broad as that definition is, it may not be broad enough. Although the term 'hearing' has an oral connotation, I see no reason why in some circumstances a 'hearing' may not be had on written materials only." (Friendly, 123 U. Pa. L. Rev. 1267, 1270.)

Section 28 is just such a circumstance, since the risk of error is not great. I appreciate the concern about the margin of error, but disagree that the margin is substantial, and note that section 28 allows for just such margin of error. First of all, the conviction or admission of guilt would be a matter of public record. Second, the Department would have access to bidding documents and corporate charters to lessen the possibility of error. Third, whatever denial of association between the corporation and guilty party and roles played by either, whatever extenuating circumstances, whatever explanation or justification a debarred bidder wishes to present to the Director could be adequately and competently done in the "written statement" permitted by the Rules' section 28. Beyond this I do not see what a hearing of the nature urged by plaintiff, or additional or substitute safeguards, would accomplish. (See *People ex rel. Scott v. Illinois Racing Board* (1973), 54 Ill. 2d 569, 577-78, where a statute, permitting summary disqualification for a harness racing license on the basis of pending criminal charges, was construed; the license applicant was found to be "clearly disqualified.")

I perceive the government's interest to be substantial. The State is concerned with efficiently and effectively making its purchases. Necessarily, delaying the award of a bid, pending a hearing to determine whether a bidder should be permanently debarred, makes no sense because the State must expedite the award on behalf of the public. Moreover, the State should keep public funds free from

any impropriety, even the appearance of impropriety. Additional or substitute proceedings would add administrative and financial burdens which are unwarranted and unnecessary. Application of the *Mathews* test sustains the sufficiency of the Rules' section 28 hearing or appeal.

Plaintiff also argues that the hearing is required *before* a right is permanently deprived and cites *Fuentes v. Shevin* (1972), 407 U.S. 67, 32 L. Ed. 2d 556, 92 S. Ct. 1983. A the circumstances exist here, I disagree. First, since a bidder's interest in getting a contract is no greater than another bidder's interest in *a given* competiton for the manufacture of one year's license plates and since the State may reject any and all bids, including the lowest bid, there is no harm in holding the Rules' section 28 appeal subsequent to the rejection of the bid. Second, as noted above, the margin of error is limited. Third, later Supreme Court cases have qualified the "requirement" of holding a hearing before the deprivation of a right. *Mitchell v. W. T. Grant Co.* (1974), 416 U.S. 600, 611, 40 L. Ed. 2d 406, 415, 94 S. Ct. 1895, 1902, held that a "hearing must be had before one is *finally* deprived" of a property interest (emphasis added). Postponement of an inquiry is not violative of due process where an ultimate determination will be had. (Judge Friendly's opinion in *Frost v. Weinberger* (2d Cir. 1975), 515 F.2d 57, 66-68, is essentially in accord. Accord, K. Davis, Administrative Law of the Seventies 268-72 (1976). Contra, *Mattern v. Weinberger* (3d Cir. 1975), 519 F.2d 150.) *Barry v. Barchi* (1979), —— U.S. ——, ——, 61 L. Ed. 2d 365, 375, 99 S. Ct. 2642, 2649, noted that where a State's interest is substantial, and so long as a party's interest is not "baselessly compromised," a post-suspension hearing on the deprivation of a property interest can pass constitutional muster.

Plaintiff contends, too, that the Rules' section 28 is applicable only where the decision made by the Depart-

ment is "pursuant to these Purchasing Rules." Because here the decision to reject was, at least partially, pursuant to section 10.1 of the Illinois Purchasing Act, section 28's appeal route is unavailable, plaintiff maintains. We find that argument involves semantics at best, frivolity at worst. *All* decisions, apropos of the purchase of commodities and equipment on behalf of the State, are made pursuant to the Rules. This is clear from the statute requiring promulgation of the Rules:

> "*All* purchases, contracts or other obligation or expenditure of funds by any State agency shall be in accordance with rules and regulations governing such State agency procurement practices and procedures which it shall promulgate and publish in sufficient number for distribution to persons interested in bidding on purchases or contracts to be let by such State agency." (Emphasis added.) (Ill. Rev. Stat. 1977, ch. 127, par. 132.5.)

The rejection of a bid, even on the basis of section 10.1 of the Illinois Purchasing Act, is a decision apropos of the purchase of commodities and equipment on behalf of the State. The language of section 17 of the Rules, "Grounds for Rejection of Bids," is not exclusive (especially subsections (a) and (c)).

For these reasons I am able to concur in the result of the majority's opinion but not in the reasoning. Plaintiff had a protectable property interest (which it should not lose without benefit of due process).